UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF
CS-3T

May 21, 1993

MEMORANDUM

SUBJECT: NL Industries status conference, May 19, 1993

FROM: Steven Siegel
Assistant Regional Counsel

Brad Bradley
Remedial Project Manager

TO: Lynn Peterson
SWER Branch Chief

Rick Karl
IL/IN Chief

BACKGROUND

On May 19, 1993, a status conference was held with Judge Foreman. The conference was treated by the Judge as a settlement conference to resolve issues raised by the defendants at the January status conference. The defendants suggested at the January status conference that a panel of experts review EPA's ROD and submit a report to the Court and EPA. The defendants have told the Court that this case will settle once remedy issues are decided. The Court has delayed ruling on motions submitted in May 1992, regarding the scope and standard of review and the scope of discovery. If the defendants proposal is accepted, the Judge may be able to avoid ruling on these issues.

Judge Foreman supported the defendants proposal and requested EPA's voluntary agreement. EPA declined the defendants' proposal. Both EPA and DOJ agree that any level of Court involvement in the administrative process established by CERCLA to select remedies is inappropriate. However, EPA made its own proposal, offering to allow a second public comment period on the portion of the ROD at issue, the residential soil cleanup level of 500 parts per million.

THE STATUS CONFERENCE

Both the City of Granite City and the Defendants rejected EPA's proposal unless EPA would consent to allowing a Court appointed expert to submit comments on EPA's remedy. The defendants allege that EPA personnel are biased and any comments submitted by the defendants will fall on deaf ears. EPA, according to the defendants, would be forced to give comments submitted by a Court expert deference which it would not give to the defendants.

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At the conclusion of the status conference, the Judge requested that EPA inform the Court of whether (1) we can accept the defendants new proposal for a Court appointed expert to comment on the remedy and (2) whether EPA intends to unilaterally go forward with a new public comment period.

RECOMMENDATION

The defendants proposal must be rejected because it still involves the Court in the remedy selection process, is inconsistent with CERCLA, and encourages parties to litigate with the government to get a second chance at influencing remedies.

It is our joint recommendation that EPA withdraw its offer to allow a second public comment period on the residential soil cleanup portion of the remedy. There are several significant disadvantages of unilaterally initiating a comment period.

1. FIELD WORK

The litigation requests injunctive relief requiring the defendants to take over the cleanup. It is important that the litigation move forward because Fund money may not continue to be available for the cleanup. The risk that Illinois may not continue to provide its matching share may also be significant. At present, we have funding adequate to keep the cleanup moving through the end of the fiscal year.

Allowing a public comment period will delay the litigation by at least six months. The comment period would be timed to start sometime after the release of an ATSDR blood-lead study conducted in Granite City. It is unclear when the study will be released, but probably not for at least two months. The comment period itself would probably be for two months, and extensive comments are expected.

During the comment period, EPA would appear inconsistent if it moved forward with portions of the cleanup which are the subject of the comment period.

Nobody expects settlement in this case. The comment period will simply delay progress in the litigation. By delaying the litigation, we will delay the day when the defendants will be required to do the work.

A public comment period on this issue also has the potential to severely damage public relations efforts at the site. Because the site is so visible and involves approximately 1600 residences, public relations problems can have major implications for the actual cleanup.

2. COMMUNITY RELATIONS

The local government and some members of the community have criticized EPA for not listening to their concerns. This criticism created difficulties in obtaining access to sample yards and may create even more problems when we attempt to get access to excavate the yards. If there is a new comment period, the public is likely to expect a change in the remedy. However, there is no new information indicating a different remedy is appropriate. The comment period is likely to be portrayed by local government and the press as more of the same from EPA, with citizen concerns falling on deaf ears.

This negative public perception will make getting access for the cleanup--and the cleanup itself--more difficult. We have an opportunity, however, to show our responsiveness to the public with other issues at the site. New information is now available indicating there is a groundwater problem which may require the removal of the 3 1/2 acre waste dump on the site which the city wants to have removed. On this portion of the remedy, we can respond to local concerns based upon sound technical reasons.

3. THE MERITS OF A COMMENT PERIOD

The experts we have hired for the litigation have stated that the record we have supports the selected remedy. The experts have also evaluated additional information regarding lead since the selection of the remedy and believe that there is no new information indicating a different cleanup level would be better.

The defendants themselves have failed to take advantage of provisions designed specifically to require the EPA to reconsider its remedy. 40 CFR § 300.825(c) requires EPA to consider significant information not on the record which could not have been submitted during the public comment period. The defendants have not submitted any information pursuant to this provision.

4. PENALTY ISSUES

If we reopen the record, we may complicate the penalty portion of the case. The defendants will argue that after the fact, EPA recognized its initial record was inadequate and used this opportunity to pack the record in its favor. If we base our new decision on information not in the original record, we may strengthen the defendants' arguments.

The Judge in this case has indicated he is not a proponent of large penalties. Because of this bias, it is especially important to make our penalty arguments in as straightforward a manner as possible. Presenting both an original and a supplemented record may confuse the Court and give some credibility to the defendants rationalizations for why EPA went forward with the comment period.

CONCLUSION

EPA has made an extraordinary offer to the defendants by volunteering to reopen the public comment period. The defendants have rejected and ridiculed the offer through their allegations of bias. It would be bad precedent for the Superfund program to reward PRPs with another chance to change a remedy simply because they chose to litigate with the government rather than cooperate. For the reasons discussed above, it would also be bad for this case.

We recommend informing the Court that EPA is withdrawing its offer to the defendants. The offer was, as far as we know, unprecedented in the Superfund program. It would not be meaningful to move forward with a comment period without indications from the defendants that the period may be useful, rather than just slow the litigation. As a concession to the defendants we should offer to allow them, pursuant to the NCP, to submit comments regarding the blood study when it is released. We can add their comments on the blood study, as well as our response, to the administrative record.

cc: Beverly Kush
Jan Carlson